

127 FERC ¶ 61,244
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suede G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Victory Garden Phase IV, LLC	Docket Nos. ER09-900-000
	ER09-900-001
Sky River LLC	ER09-901-000
	ER09-901-001
FPL Energy Cabazon Wind, LLC	ER09-902-000
	ER09-902-001

ORDER CONDITIONALLY GRANTING MARKET-BASED RATE
AUTHORIZATION

(Issued June 15, 2009)

1. In this order, the Commission conditionally grants market-based rate authorization to Victory Garden Phase IV, LLC (Victory Garden), Sky River LLC (Sky River), and FPL Energy Cabazon Wind, LLC (FPL Cabazon) (collectively, FPL Applicants), effective June 1, 2009, as requested.¹ This authorization is conditioned on the requirement that the Sagebrush Partnership (Sagebrush) file an Open Access Transmission Tariff (OATT) if any third party customer requests transmission service on its transmission line, within 60 days of receiving such a request.²

¹ Victory Garden, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-2, First Substitute Sheet No. 3; Sky River, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-2, First Substitute Sheet No. 3; and FPL Energy Cabazon, FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-2, First Substitute Sheet No. 3.

² Sagebrush is a general partnership that owns and operates a 46-mile, 230 kV transmission line that extends from the Tehachapi region of California to Southern California Edison Company's Vincent Substation.

2. Additionally, we find that each of the FPL Applicants meets the criteria for Category 2 sellers and is so designated. FPL Applicants must file an updated market power analysis in compliance with the regional reporting schedule adopted in Order No. 697.³

Background

3. On April 1, 2009, the FPL Applicants each filed initial applications for market-based rate authority with accompanying market-based rate tariffs (April 1 Filings). The proposed market-based rate tariffs provide for the sale of energy, capacity, and ancillary services at market-based rates. FPL Applicants each request waivers commonly granted to similar market-based rate applicants.

4. FPL Applicants state that they are wholly-owned indirect subsidiaries of NextEra Energy, a Delaware limited liability company, which in turn is a wholly-owned indirect subsidiary of FPL Group, Inc. (FPL Group), a Florida corporation. FPL Applicants add that NextEra Energy's subsidiaries currently own or operate generating facilities in 25 states with a combined net generating capacity of 16,000 megawatts (MW), of which 1,746 MW are located in the California Independent System Operator Corporation (CAISO) and its first-tier markets.

5. In its April 1 Filing, Victory Garden states that it owns and operates an approximately 22 MW wind energy facility located in Tehachapi, California. Victory Garden represents that, since 1990, it has sold all of the output from its facility to Southern California Edison, pursuant to four long-term power purchase agreements.

6. In its April 1 Filing, Sky River states that it owns and operates an approximately 77 MW wind energy facility located in Tehachapi, California. Sky River represents that, since 1991, it has sold all of the output from its facility to Southern California Edison, pursuant to three long-term power purchase agreements.

³ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 882-93, app. D (2007), *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at apps. D, D-1, and D-2 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *order on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008).

7. In its April 1 Filing, FPL Cabazon states that it owns and operates a 40 MW wind energy facility located near Cabazon, California (Cabazon Facility). FPL Cabazon represents that the Cabazon Facility commenced operation in 1985, and it has sold all of the output over the past ten years from its facility to Southern California Edison, pursuant to a long-term power purchase agreement that expires in 2014.

8. FPL Applicants state that they are affiliated with Florida Power & Light Company (Florida Power), a franchised public utility that provides wholesale and retail electric service to customers in Florida, and that Florida Power's transmission facilities are located primarily within Florida. Additionally, FPL Applicants state that Florida Power has a division in New England which owns a single transmission asset, the Seabrook Substation, located in Seabrook, New Hampshire.

9. FPL Applicants state that they are also affiliated with Sagebrush through NextEra Energy's 42.9 percent ownership interest in Sagebrush.

10. On May 20, 2009, the Director, Division of Tariffs and Market Development – West, issued a data request for revisions to the market-based rate tariffs submitted by FPL Applicants (May 20 Data Request).⁴

11. On May 21, 2009, FPL Applicants filed their response to the May 20 Data Request (May 21 Response) making the requested revisions to their market-based rate tariffs.

Notice of Filing and Responsive Pleadings

12. Notice of the April 1 Filings was published in the *Federal Register*, 74 Fed. Reg. 16,853 (2009), with interventions or protests due on or before April 22, 2009. None was filed.

13. Notice of the FPL Applicants' requests for blanket authorization under Part 34 was separately published in the *Federal Register*, 74 Fed. Reg. 17,473-74 (2009), with interventions or protests due on or before April 27, 2009. None was filed.

⁴ *Victory Garden Phase IV, LLC*, Docket No. ER09-900-000 (May 20, 2009) (unpublished letter order).

14. Notice of the May 21 Response was published in the *Federal Register*, 74 Fed. Reg. 26,394 (2009), with interventions or protests due on or before May 29, 2009. None was filed.

Discussion

Market-Based Rate Authorization

15. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.⁵ As discussed below, the Commission concludes that FPL Applicants satisfy the Commission's standards for market-based rate authority.

1. Horizontal Market Power

16. The Commission adopted two indicative screens for assessing horizontal market power, the pivotal supplier screen and the wholesale market share screen.⁶ FPL Applicants each prepared the pivotal supplier and wholesale market share screens for the CAISO market, consistent with the requirements of Order No. 697.⁷

17. The Commission has reviewed the pivotal supplier and the wholesale market share screens and has determined that each of the FPL Applicants passes both screens in the CAISO market. Accordingly, we find that FPL Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power.

2. Vertical Market Power

18. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved OATT on file before granting a seller market-based rate authorization.⁸

⁵ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 62, 399, 408, 440.

⁶ *Id.* P 62.

⁷ *Id.* P 235-36.

⁸ *Id.* P 408.

19. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁹ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities; sites for generation capacity development; and sources of coal supplies and equipment for the transportation of coal supplies, such as barges and rail cars (collectively, inputs to electric power production).¹⁰ The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.¹¹

20. FPL Applicants state that their affiliate, Florida Power, owns and operates transmission facilities in Florida and New England. FPL Applicants represent that service over Florida Power's transmission facilities is administered pursuant to the Florida Power OATT, which is on file with the Commission.¹² They add that Florida Power's New England transmission facilities are under the operational control of ISO New England, Inc. (ISO-NE) and subject to the ISO-NE OATT.¹³

21. FPL Applicants further state that neither they nor the subsidiaries of NextEra Energy own or control transmission facilities, with the exception of facilities necessary to interconnect generating facilities to the transmission grid.

22. With regard to the Sagebrush line, FPL Applicants acknowledge that the Commission has authority under sections 210 and 211 of the Federal Power Act¹⁴

⁹ *Id.* P 440.

¹⁰ *Id.* P 447. In Order No. 697-A, the Commission revised the definition of inputs to electric power production to include "physical coal supply sources and ownership of or control over who many access transportation of coal supplies." Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 176.

¹¹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 447.

¹² *Florida Power & Light Company*, 92 FERC ¶ 61,241 (2000).

¹³ *See New England Power Pool*, 83 FERC ¶ 61,045 (1998), *reh'g denied*, 95 FERC ¶ 61,074 (2001).

¹⁴ 16 U.S.C. §§ 824i, 824j (2006).

to direct interconnection and transmission service over privately-owned transmission lines used by generators in order to ensure that excess transmission capacity is not withheld from the market.¹⁵

23. With regard to other barriers to entry, FPL Applicants state that they do not own or control intrastate natural gas transportation, intrastate natural gas storage or distribution facilities. However, FPL Applicants explain that their affiliate, FPLE Forney Pipeline, L.P., owns and operates a 1,000 foot natural gas pipeline located in the Electric Reliability Council of Texas. FPL Applicants state that neither they nor any of their affiliates own or control any sites for generation capacity development in the relevant market, or physical coal supply sources and ownership or control over who may access transportation of coal supplies.

24. FPL Applicants each affirmatively state that neither they nor any of their affiliates have erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.

25. We disagree with FPL Applicants' representations that except for the transmission facilities owned by Florida Power, neither they nor their affiliates own or control transmission facilities, with the exception of facilities necessary to interconnect generating facilities to the transmission grid. As noted above, FPL Applicants state that they are also affiliated with Sagebrush through NextEra Energy's 42.9 percent ownership interest in Sagebrush. Sagebrush owns and operates a 46-mile, 230 kV transmission line that extends from the Tehachapi region of California to Southern California Edison Company's Vincent Substation. In *EDFD Handsome Lake*,¹⁶ issued concurrently with this order, we rejected assertions that the Sagebrush line is limited equipment necessary to connect individual generating facilities to the transmission grid. In *EDFD Handsome*

¹⁵ The Commission has previously determined that Sagebrush should be required to provide firm transmission service over the Sagebrush line. *Aero Energy, LLC*, 115 FERC ¶ 61,128, at P 35 (2006), *order granting modification*, 116 FERC ¶ 61,149, at P 27 (2006), *final order directing interconnection and transmission service*, 118 FERC ¶ 61,204 (2007), *order denying reh'g*, 120 FERC ¶ 61,188 (2007) (*Aero Energy Orders*).

¹⁶ *EDFD Handsome Lake*, 127 FERC ¶ 61,243, at P 13 (2009).

Lake,¹⁷ we found that based on the Commission's findings in *Aero Energy, LLC*,¹⁸ the Sagebrush line is a transmission facility.

26. In *EDFD Handsome Lake*, we also found that, based on the provision of service to Aero Energy in compliance with our prior orders, the EDFD Subsidiaries satisfy the vertical market power analysis for market-based rates, subject to the condition that Sagebrush file an OATT if any third party customer requests transmission service on the Sagebrush line, within 60 days of receiving such a request. We found this to be consistent with our precedent on waivers of the open access tariff requirement. Consistent with our determination in *EDFD Handsome Lake*, we will condition the FPL Applicants' market-based rate authorizations on the requirement that Sagebrush file an OATT if any third party customer requests transmission service on the Sagebrush line, within 60 days of receiving such a request.¹⁹

Waiver Requests

27. FPL Applicants each request the following waivers and authorizations: (1) waiver of Subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except as to sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of Parts 41, 101, and 141 of the Commission's accounting and periodic reporting requirements; and (3) blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

28. The Commission will grant the requested waivers and authorizations consistent with those granted other entities with market-based rate authorizations.²⁰ Notwithstanding the waiver of the accounting and reporting

¹⁷ *Id.*

¹⁸ *Aero Energy, LLC*, 115 FERC ¶ 61,128, at P 21 (2006).

¹⁹ *Id.*

²⁰ It should be noted that the Commission has recently examined and approved the continued applicability of the waivers of its accounting and reporting requirements (18 C.F.R. Parts 41, 101, and 141), as well as continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities (18 C.F.R. Part 34). *See* Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 984-85 (regarding waiver of Parts 41, 101, and 141), 999-1000 (regarding blanket approval under Part 34).

requirements here, the Commission expects FPL Applicants to keep their accounting records in accordance with generally accepted accounting principles.

Reporting Requirements

29. Consistent with the procedures the Commission adopted in Order No. 2001, an entity with market-based rate authorization must file electronically with the Commission an Electric Quarterly Report (EQR) containing: (1) a summary of the contractual terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or longer) market-based power sales during the most recent calendar quarter.²¹ Public utilities must file EQRs no later than 30 days after the end of the reporting quarter.²²

30. Additionally, FPL Applicants must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.²³

²¹ *Revised Public Utility Filing Requirements*, Order No. 2001, FERC Stats. & Regs. ¶ 31,127, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334 (2003). Attachments B and C of Order No. 2001 describe the required data sets for contractual and transaction information. Public utilities must submit Electric Quarterly Reports to the Commission using the EQR Submission System Software, which may be downloaded from the Commission's website at <http://www.ferc.gov/docs-filing/eqr.asp>.

²² The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10b (2008). Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

²³ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005); 18 C.F.R. § 35.42(a) (2008).

31. In Order No. 697, the Commission created two categories of sellers.²⁴ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888²⁵); that are not affiliated with anyone that owns, operates or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.²⁶ Sellers that do not fall into Category 1 are designated as Category 2 and are required to file an updated market power analysis.²⁷

32. Based on FPL Applicants' representations, we find that they each meet the criteria for Category 2 sellers and are so designated. Thus, FPL Applicants must file an updated market power analysis for the Southwest Region in compliance with the regional reporting schedule in Order No. 697.²⁸ The Commission also reserves the right to require an updated market power analysis at any intervening time.²⁹

²⁴ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 848.

²⁵ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

²⁶ 18 C.F.R. § 35.36(a)(2) (2008).

²⁷ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 850.

²⁸ *Id.* P 882.

²⁹ *Id.* P 853.

The Commission orders:

(A) FPL Applicants' market-based rate tariffs are each accepted for filing effective June 1, 2009, as discussed in the body of this order.

(B) FPL Applicants' market-based rate authorization is hereby conditioned on the requirement that Sagebrush file an OATT if any third party customer requests transmission service on the Sagebrush line, within 60 days of receiving such a request.

(C) Waiver of the provisions of Subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15 and 35.16, is hereby granted.

(D) Waiver of Parts 41, 101, and 141 of the Commission's regulations is hereby granted, with the exception of 18 C.F.R. §§ 141.14, 141.15 (2008).

(E) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is granted. FPL Applicants are hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the corporate purposes of FPL Applicants, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(F) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of FPL Applicants' issuances of securities or assumptions of liability.

(G) FPL Applicants are each required to file EQRs in compliance with Order No. 2001. If the effective date of any of the FPL Applicants' market-based rate tariffs falls within a quarter of the year that has already expired, each of the FPL Applicants' EQRs for the expired quarter(s) are due within 30 days of the date of this order.

(H) FPL Applicants are each directed to file an updated market analysis according to the regional reporting schedule adopted in Order No. 697.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.